85-1036

No. 85-

Supreme Court, U.S.
FILED
DEC 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, *et al.*,
Petitioners,

v.

JOSEPH P. GALDA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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December 1985

CASILLAS PRESS INC - 1717 K STREET NW WASHINGTON DC - 223-1220

26 pp

QUESTIONS PRESENTED FOR REVIEW*

1. Does the First Amendment prohibit a state university from using mandatory but refundable student fees to support a neutral funding plan which, among other things, subsidizes a student organization of undisputed educational value that, in addition to apolitical activities, takes positions on some issues of public policy?

2. If such funding is impermissible, must the assessment of the mandatory fee be enjoined, or should the court of appeals have remanded the matter to the district court to consider other, less intrusive, remedies, such as placing the student fees in an escrow account of the type approved in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, ____ U.S. ____, 104 S.Ct. 1883 (1984)?

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*In addition to Rutgers, The State University of New Jersey, the petitioners are Dr. Edward J. Bloustein, Dr. Norman Reitman, Donald S. McNaughton, David A. Werblin, Katherine Elkus White, Donald M. Dickerson, Sanford M. Jaffee, Robert Kaplan, Edward Kramer, Linda Stamato, Robert J. Torricelli, Mary White Bell and Walter K. Gordon, all of whom were defendants in the district court and appellees in the court of appeals. In addition to Joseph P. Galda, the respondents are Paul Ewert, Kristina Farrow Cypel, Thomas H. Odom, Joseph Randall Corman, Lori Keeley, Leslie Beebe, Leonard Scott Kelter, Edward D. Wickham, and Christopher Lepre, all of whom were plaintiffs in the district court and appellants in the court of appeals. Intervenor New Jersey Public Interest Research Group, Inc., an appellee in the court of appeals, is also nominally a respondent on this petition, although it has been aligned with Rutgers as a defendant in this litigation and is filing its own petition for a writ of certiorari. There were no parties in the court of appeals other than those listed in this footnote.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the District Court for the District of New Jersey, granting defendants' motion for summary judgment, is reported at 516 F. Supp. 1142 (1981). The opinion of the Court of Appeals for the Third Circuit, reversing and remanding the case, is reported at 686 F.2d 159 (1982) and is reproduced in the separate Appendix to this petition at 45a-65a.

The opinion of the District Court for the District of New Jersey, entering final judgment in favor of defendants, is reported at 589 F. Supp. 479 (1984) and reproduced at 71a-104a. The opinion of the Court of Appeals for the Third Circuit, reversing, is reported at 772 F.2d 1060 and is contained in the Appendix at 1a-40a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on August 28, 1985. 67a-68a. On October 11, 1985, the Court of Appeals denied timely petitions for rehearing which had been filed by petitioners Rutgers, The State University of New Jersey, *et al.* ("Rutgers") and by New Jersey Public Interest Research Group, Inc. ("NJPIRG"). 69a-70a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This action was filed pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343 on September 4, 1979 by certain students then attending Camden College of Arts and Sciences, a component of defendant Rutgers. Plaintiffs contended that their First Amendment rights were violated by Rutgers' creation of a content-neutral funding mechanism for student groups that demonstrate both (i) significant educational value to the body of the University concerned with review of educational policy matters and (ii) student support. In particular, plaintiffs sought to bar funding through this mechanism of defendant NJPIRG,

an organization of undisputed educational value that engages in some advocacy on public issues.[1] Defendants now petition this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in plaintiffs' favor, a decision that is inconsistent with the trial court's findings of fact, the decisions of the Third Circuit itself, and the decisions of this Court.

The district court originally granted defendants' motion for summary judgment, finding that whatever infringement upon plaintiffs' constitutional rights resulted from the student fee in question was cured by the neutral funding mechanism's provision for a full refund upon demand. 516 F. Supp. 1142 (D.N.J. 1981). Upon appeal, the Third Circuit, in a unanimous panel opinion ("*Galda I*") authored by Judge Adams (who later dissented from the decision that is the subject of this petition), held that, at least on the undisputed facts before it, the availability of a refund did not immunize the funding mechanism from constitutional challenge. The Third Circuit thus reversed and remanded the case for trial under the following principles:

> Although many student-related groups have ideological overtones, to the extent that the university determines that an organization is an appropriate participant in the total university forum, considerable deference should be accorded that judgment. This deference stems from the long-standing recognition that the university as a whole functions as a forum for the exchange of

[1]There is no dispute that NJPIRG is a non-partisan organization. 4a, 12a-13a, 25a n.4.

diverse views. As the Supreme Court has observed, "[t]he college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.' " *Healy v. James,* 408 U.S. 169, 180 (1972); *Widmar v. Vincent* [454 U.S. 263], 102 S. Ct. 269, 273 n.5 (1981). The holdings in *Veed* [*v. Schwartzkopf,* 353 F. Supp. 149 (D. Neb.), *aff'd mem.,* 478 F.2d 1407 (8th Cir. 1973), *cert. denied,* 414 U.S. 1135 (1974)] and *Arrington* [*v. Taylor,* 380 F. Supp. 1348 (M.D.N.C. 1974), *aff'd mem.,* 526 F.2d 587 (4th Cir. 1975)] thus correctly indicate that the university has broad latitude in providing an opportunity for students to participate in – and to oppose – the expression of a broad spectrum of ideology.

To overcome the presumptive validity of the university's judgment that an organization contributes to the university community and to make out a prima facie case that exaction of the fee conflicts with the mandates of the first amendment, persons objecting to the fee must establish that the challenged group functions essentially as a political action group with only an incidental educational component. At that point the burden of producing evidence to counter the plaintiffs' showing or to otherwise demonstrate a compelling state interest shifts to the university. We do not rule out the possibility that, even in the face of an unrebutted prima facie showing, the university might demonstrate a compelling state interest by establishing the importance of the challenged group's contribution to the university forum.

59a-60a.

Following a ten-day bench trial in January and February of 1984, at which 36 witnesses testified, the district

court filed detailed and extensive findings of fact and conclusions of law in accordance with the standard enunciated in *Galda I.* 71a-104a. The district court entered judgment for defendants on the ground that the plaintiffs had "failed to overcome the presumptive validity of the University's judgment [that the neutral funding system and its application to NJPIRG have substantial, and not incidental, educational value] and have thus failed to make out a prima facie case that their constitutional rights have been violated." 104a. The following is a synopsis of relevant portions of the district court's findings of fact:

1. The majority of student organizations at Rutgers are funded through a mandatory, non-refundable student fee collected by the university as part of each term's bill. 76a. The funds generated by the fee are apportioned on each campus of the University by a small committee of students. Each student committee determines which student groups on its campus will be subsidized. In practice, the fee subsidizes different groups on each campus, including student groups that take positions on political and social issues, such as the American Civil Liberties Union, the Jewish Awareness Club, the National Association for the Advancement of Colored People, and the Gay Alliance. 76a-77a.

2. In 1972, Rutgers determined to and did establish a content-neutral alternative funding mechanism for student groups that could establish significant educational value and broad student support on a particular campus. A copy of that policy, as amended in 1973, is contained in the Appendix at 105a. Money is generated by a mandatory but refundable student fee. Educational value is determined by the University President and the University Senate, a pre-existing advisory body on educational policy composed of administrators, faculty, and students who review a

concept plan submitted by the student group seeking funding. 79a. Student support is established through student-run referenda. *Id.* Unlike the general student fee, the fee collected pursuant to the alternative neutral funding mechanism is refundable upon request. The procedure of concept plan approval and referenda is repeated every three years for any group that desires continued funding. 105a. Two organizations have taken advantage of this neutral funding policy: *The Daily Targum*, the undergraduate newspaper of the New Brunswick campus, and NJPIRG, the particular organization at issue here. 81a. Rutgers' purpose in creating this policy was to provide valuable educational opportunities to Rutgers' students through the creation of a forum for the expression of diverse student viewpoints, access to which was not controlled by the committee on each campus. 76a-81a.

3. NJPIRG is a student organization that has obtained funding on some of Rutgers' campuses from 1972 to the present pursuant to the neutral funding mechanism. 80a. It engages in a wide spectrum of apolitical and some "political" activities. 85a-88a. NJPIRG's single largest project – stream-walking to check for signs of pollution – constituting 40 percent of NJPIRG's activities (86a), is admittedly apolitical. NJPIRG also sponsors public fora, debates, and lectures on various issues, including those relevant to education and tuition matters of direct interest to Rutgers students. *Id.* Students have also researched, written, and disseminated pamphlets and guides for student use on such topics as the transportation system at the New Brunswick campus of Rutgers and banking and garage services available locally. *Id.*

4. NJPIRG has provided internships for hundreds of Rutgers students. 84a-85a, 88a-95a. In order to obtain credit for an internship, a student contacts a faculty

member, describes the proposed project, and obtains the faculty member's commitment to supervise it and award credit. 85a. It is entirely up to the faculty member to decide whether to give approval to a particular project and, if so, whether requirements will be imposed on the interns which go beyond those set by NJPIRG. *Id.* "PIRG staff members meet with PIRG interns on at least a weekly basis and provide faculty members with evaluations of the students' work at PIRG," but it is the faculty member who assigns the grade. 85a. Rutgers grants credit for non-NJPIRG internships as well, but most of the faculty members who testified "felt that PIRG internships are superior to other available internships, primarily because of PIRG's excellent supervision of student interns, because PIRG is on-campus and accessible to both faculty and students and because PIRG is an organization that works on issues of particular interest to students." 102a.

5. Any student at Rutgers, whether or not active in NJPIRG, may submit suggested projects for the consideration of NJPIRG's Board of Directors. 83a. The projects and positions of NJPIRG are selected annually by the students governing the organization. *Id.* An executive director is hired by the student board of directors to oversee the organization's activities on a day-to-day basis, and employees of NJPIRG advise the students and assist in the development and execution of projects, but staff members do not serve on the Board of Directors. 83a-84a.

6. Some students who become involved in NJPIRG do so for the opportunity to engage in non-partisan analysis, study, and advocacy on various public policy issues. However, the unrebutted testimony of Rutgers officials, based on contemporaneous documentation, established that Rutgers included NJPIRG in the neutral funding plan for its educational benefits. 76a-80a, 99a-100a. Moreover,

the unrebutted testimony of Rutgers faculty members, as well as overwhelming evidence from Rutgers students and from administrators from Rutgers and other renowned universities, established that NJPIRG offered and continues to offer substantial educational benefits. 88a-95a, 96a-103a. The district court thus found that "PIRG has a very substantial educational component, and that its presence at Rutgers significantly enhances the educational opportunities available for students at that institution." 102a-103a.

The factual findings of the district court in support of its judgment in favor of defendants are binding upon an appellate court unless found to be clearly erroneous. *See Anderson v. City of Bessemer City,* ____ U.S. ____, 105 S. Ct. 1504 (1985).

Plaintiffs appealed the judgment of the district court and on August 28, 1985, a panel comprised of Judges Weis and Wisdom, with Judge Adams dissenting, reversed and entered judgment in plaintiffs' favor (*Galda II*). Whereas the *Galda I* court recognized that a university's judgment in creating an educational forum can withstand constitutional challenge so long as a participating group, even if politically oriented, has an educational function, the *Galda II* panel ignored the district court's findings as to the educational contributions of NJPIRG and instead focused on the motives of some students who participate in NJPIRG. In so doing, the panel rejected the district court's factual findings without any determination that those findings were clearly erroneous. The panel conceded that "PIRG is politically non-partisan" and that "the training PIRG members may receive is considerable," but nonetheless characterized NJPIRG's objectives as "frankly ideological." 4a, 13a. According to the *Galda II* panel,

because students may work on NJPIRG internships with ideological goals in mind, NJPIRG's subtantial educational function is still "incidental"; that is, the educational function arises from or accompanies ideological goals. 13a. The panel further characterized NJPIRG as an outside organization independent of Rutgers and held that, when such a group participated in the university forum, no compelling state interest in balanced exposure to ideas would legitimize mandatory funding. 16a. The *Galda II* majority reversed and remanded for entry of an order enjoining the assessment of the mandatory fee paid to NJPIRG. 18a.

Judge Adams, the author of the *Galda I* opinion, dissented from the opinion in *Galda II*. Judge Adams indicated that the *Galda II* majority had misconstrued the *Galda I* standard by focusing on the objectives of NJPIRG which, according to the majority, by definition are ideological. The majority thus

> sidestep[ped] the second part of the *Galda I* prima facie inquiry by finding that the group's "political" objectives effectively negate its educational component. It [held] that where a group's objectives are primarily political, the extent of the group's educational benefits to the university community is immaterial.

30a. Judge Adams also noted the majority's rejection of *Galda I*'s requirement that judicial deference be accorded the university's judgment that a political group contributes to the university forum. 24a-27a. Judge Adams further observed that the majority's holding, while designed to further First Amendment interests, would actually frustrate them by requiring public universities to exclude certain student groups from open forums solely because of the positions taken by the groups:

> The majority's result . . . would effectively inhibit political speech under the rubric of the First Amendment. . . . I would hold that where a state university establishes an educational equal access forum funded by student fees, it does not impermissibly violate the objecting students' First Amendment rights by directing their fees to particular groups, so long as it grants access to the funding mechanism on educational and equal access grounds.

38a.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW CONCERNING THE RIGHT OF A STATE UNIVERSITY TO CONTROL THE MANNER IN WHICH ITS STUDENTS ARE EDUCATED, QUESTIONS THAT WERE DECIDED BY THE COURT OF APPEALS IN A MANNER IRRECONCILABLE WITH *WIDMAR V. VINCENT*, 454 U.S. 263 (1981), *ABOOD V. DETROIT BOARD OF EDUCATION*, 431 U.S. 209 (1979), AND OTHER PERTINENT DECISIONS OF THIS COURT.

The irreconcilable differences between the *Galda II* opinion and the decisions of this Court — differences that cannot be overemphasized — are most apparent in three areas. First, the *Galda II* opinion focuses on the motives of the students who join a challenged organization rather than on the educational judgments made by the university when creating a forum for expression. In so doing, the *Galda II* opinion could be applied in such a way as to support the withdrawal of student fee funding from numerous student groups at Rutgers and other state universities and colleges because students are attracted to the groups by the opportunity to deal with public policy questions. Secondly, the *Galda II* opinion ignores the First Amendment

rights of non-objecting students by requiring Rutgers to exclude student groups from a public forum on the basis of the content of their speech. Not only is such an exclusion unconstitutional, but Rutgers is forced to make quasi-judicial decisions as to what constitutes ideological speech instead of making those judgments which it is uniquely qualified to make: *i.e.*, whether a group has a significant educational function. Finally, *Galda II* does not address the issue of the refundability of the fee paid to support the neutral funding system. Thus, by enjoining the assessment of a mandatory fee, the *Galda II* court overlooked other, less intrusive, remedies.

A. *Galda II* Is Inconsistent With the Decisions of This Court Which Examine a University's Motives in Establishing a Public Forum Rather Than the Motives of the Forum's Participants.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court made clear that the constitutionality of a student group's inclusion in a public university forum depends on the university's motives for creating the forum rather than the goals of the student group. In *Widmar*, students sought access to university facilities supported by a mandatory student fee in order to hold religious meetings and otherwise advance their religious objectives. The students pointed out that other, non-religious, student groups already were permitted such access. The university refused to permit access to the student religious group, however, fearing that it might thus violate the anti-establishment clause of the First Amendment. Despite the religious objectives of the group's members, this Court nevertheless permitted it to use the university facilities. The Court recognized that the university promoted a secular purpose

– *i.e.*, the exchange of diverse views by students – in adopting an open-forum policy and in allowing a religious group to take advantage of it on the same terms as other groups. 454 U.S. at 271. Although it happened that a religious group would benefit from such a policy, the religious benefits were "incidental" to the secular purpose underlying the policy adopted by the university and applied to all groups. *See also Mueller v. Allen,* 463 U.S. 388, 394-95 (1983) (there is a secular purpose for tax deductions allowed for school expenses, even though the statute benefits the parents of children attending parochial schools).

Under the analysis employed by this Court in *Widmar,* then, when the motives of a university in using mandatory student fees to operate an open forum are content-neutral, the objectives of a student group participating in that forum are of no consequence in determining whether the constitutional rights of other students have been infringed. Such an analysis recognizes the deference that is due to a university's judgment in creating such a forum in the first place. *See, e.g.*, 59a-60a (*Galda I*).

The educational motives of Rutgers in establishing the funding policy at issue here could not be clearer. As the district court specifically found, Rutgers sought to create valuable educational opportunities for Rutgers students through the creation of a forum for the expression of diverse student views. 78a, 99a-100a. The *Galda II* panel ignored the legitimate motives of Rutgers, however, and focused instead on what it perceived as the ideological objectives of NJPIRG. Such an analysis is not only inconsistent with *Widmar* and with the deference that is due a university's educational judgments, it also could lead to the withdrawal of funding from any student group whose members may be motivated by ideological concerns.

The *Galda II* majority attempted to distinguish NJPIRG from other student groups by characterizing it as an "outside organization independent of a university." 16a. In so doing, however, the *Galda II* panel ignored the factual findings of the district court to the contrary. Moreover, the majority failed to recognize that, as Judge Adams noted in his dissent, numerous student groups, such as the ACLU and NAACP, do not in fact operate "inside" a university and under its control. 26a-27a n.5. Since there is no meaningful distinction between NJPIRG and a substantial number of student groups whose members are interested in public policy issues, an analysis that focuses on the motives of students rather than the motives of the university endangers the funding of many long-established student groups. Such a threat, while surely unintended by the *Galda II* majority, could be the unfortunate result of the *Galda II* court's failure to follow *Widmar v. Vincent*.

B. *Galda II* Is Inconsistent With the Decisions of This Court Prohibiting the Exclusion of Student Groups From a Public Forum on the Basis of the Content of Their Speech, Absent a Compelling Justification.

Universities provide forums for the exchange of ideas. As participants in these forums, students constantly exchange the roles of speaker and audience, each role imbued with interests of constitutional proportions. To fulfill its role properly, the university must respect those sometimes competing interests by providing access in such a way that the legitimate and compelling purpose of the forum — education — is enhanced by directing resources to activities with substantial educational value, while being careful to minimize its censorship of the content of the speech engaged in by students and faculty, whether inside or outside the classroom.

Under *Galda II,* however, a university may not allow, as part of a neutral funding policy, student fees to be used to fund organizations whose student members wish to take a stand on issues of public policy, even when those students who object have a right to the refund of their fees. Such a restriction places a university in the difficult position of regulating access to its student-subsidized forum on the basis of the political or ideological content of speech. This Court has already held, however, that it is constitutionally impermissible to bar access to a student-supported forum according to content-based criteria. Specifically, in *Widmar v. Vincent,* this Court held that, once a university has established an open forum, it cannot bar a student group from participating in that forum because of the content of its speech. Once the student group qualifies for inclusion in the forum under content-neutral criteria, the objections of opposing student groups lose any constitutional validity. Thus, in *Widmar* this Court observed:

> The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy v. James,* 408 U.S. 169 (1972).[13] In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

454 U.S. at 273. Footnote 13 referred to in the above quotation states in applicable part:

> [13]This case is different from case in which religious groups claim that the denial of facilities *not* available to other groups deprives them of

> their rights under the Free Exercise Clause. Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and *it is on the bases of speech and association rights that we decide the case.*

Id. (second emphasis added). This Court thus ruled that the university's content-based regulations must fall and the student religious group must be permitted use of the student fee-supported facilities:

> Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. [Citations omitted]. In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. [Citation omitted].

Id. at 269-70.

Just as the students in *Widmar* had a First Amendment right to have their religious speech heard in the university's open forum, so do those students who wish to participate in educationally valuable "political" speech through NJPIRG have a First Amendment right of access to the Rutgers forum. *See Consolidated Edison Co. v.*

Public Service Comm'n, 447 U.S. 530 (1980); *Mills v. Alabama*, 384 U.S. 214 (1966); and other authorities cited by Judge Adams at 27a [illegible]utgers is free to exclude NJPIRG or any other group which meets the conditions stated in the policy only if there is a compelling justification for content-based discrimination. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). Since the district court found no such compelling justification, the *Galda II* opinion is irreconcilable with the constitutional precedents of this Court.

As a result of the *Galda II* panel's failure to consider the First Amendment interests of those students who do not object to NJPIRG's inclusion in the Rutgers forum, Rutgers and other public colleges and universities now must, before allowing a student group to be subsidized by mandatory student fees, attempt to predict what a court will decide if it is later alleged that the group has ideological objectives. A university is ill-equipped, however, to assume the task of separating ideological from non-ideological groups. It is a task that even exasperated the *Galda II* majority. 14a. Recognizing that such an exercise is cumbersome as well as unconstitutional, the *Galda I* court instead crafted a test that was both content-neutral and well within the expertise of a university: *i.e.*, whether a challenged student group has an educational component that is more than merely incidental. The *Galda I* test is consistent with this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), to the effect that the compelled subsidy of political or ideological speech violates the First Amendment only when that speech is substantially unrelated to an important, constitutionally recognized purpose of the organization compelling the subsidy. In *Abood* that purpose was collective bargaining.

Here the goal is maintaining the academic freedom necessary to permit the educators at our state universities to fulfill their crucial educational role in our society free of outside interference. *See Minnesota State Board For Community Colleges v. Knight,* 465 U.S. 271, 294 (1984) (Marshall, J., concurring in judgment); *Regents of the University of California v. Bakke,* 438 U.S. 265, 312 (1978) (opinion of Powell, J.). Not only is the *Galda I* test consistent with *Abood,* but it is based on this Court's decision in *Widmar v. Vincent,* which focused on the motives of a university in creating a public forum. The *Galda I* court understood that a public organization, such as a university, is peculiarly well-equipped to make funding decisions on the basis of criteria that are central to that organization's goals. When a university is forced to use other criteria, such as whether a group is ideological, it is driven into a constitutional thicket from which it may not be able to escape. Unfortunately, the *Galda II* court ignored both the practical and constitutional implications of *Abood, Widmar,* and *Galda I,* with with the result that universities such as Rutgers are now required to assume the quasi-judicial role of distinguishing ideological from non-ideological speech.

C. *Galda II* Is Inconsistent With the Decisions of This Court Which Examine When and How a Fee Is Refundable When Determining Whether a Fee Has Been Assessed Unconstitutionally.

In the recent decision of *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* ____ U.S. ____, 104 S. Ct. 1883 (1984), this Court reaffirmed that when and how a mandatory fee is refundable is relevant to the inquiry of whether that fee has been assessed in violation of

the First Amendment. In *Ellis,* members of a union objected on First Amendment and statutory grounds to several of the union's uses of their mandatory dues. This Court noted that a pure rebate – *i.e.,* a refund of dues after those dues had been exacted and used – would be insufficient to cure any violation. *Id.* at 1890. This Court further observed, however, that a refund of the dues after placement in an interest-bearing escrow account was a constitutionally permissible remedy. *Id.* This is because the constitutional interest at stake is not the assessment of the fee in the first place but the use of the dues to support certain ideological activities to which objection is made. *Id.*

The *Ellis* decision guided the Third Circuit in *Robinson v. State of New Jersey,* 741 F.2d 598 (3d Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1228 (1985), which involved similar claims by members of a different union. The *Robinson* court acknowledged that "a temporary loss of funds does not have the same impact on constitutionally protected speech that the denial of a forum or the forcible contribution to a political cause against one's will would have." 741 F.2d at 611. Since the dues in *Robinson* incorporated both an escrow account refund as well as other remedies approved by this Court in *Ellis,* there was no need to enjoin the assessment of the dues. *Id.* at 612-14.

In issuing a blanket injunction against the assessment of those neutral funding fees used to subsidize NJPIRG, the *Galda II* majority never even addressed the issue of when and how the mandatory fees could be refunded without constitutional injury: for example, whether a portion of the NJPIRG fees collected in a given semester could be placed in an interest-bearing escrow account and then refunded with interest upon the request of students. The majority apparently assumed that plaintiffs' First Amendment rights were violated by the *assessment* of the fee,

rather than by NJPIRG's *use* of the fees prior to their refund. Such an assumption clearly contradicts this Court's decision in *Ellis*.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1985